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OFFICE OF PETITIONS

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In re Patent No. 7,605,138
Issued: October 20 2009
Application No. 10/613,524
Filed: July 3, 2003
Attorney Docket No. C1037.70042US00

:DECISION ON REQUEST
:FOR RECONSIDERATION
:OF PATENT TERM ADJUSTMENT
:AND
:NOTICE OF INTENT TO ISSUE
:CERTIFICATE OF CORRECTION

This is in response to the REQUEST FOR RECONSIDERATION OF PATENT TERM ADJUSTMENT UNDER 37 CFR §1.705(D) filed December 18, 2009. Applicant requests that the determination of patent term adjustment be corrected from 732 days to 1309 days. Applicant requests this correction in part on the basis that the Office will take in excess of three years to issue this patent and in light of the recent court decision in Wyeth v. Dudas, No. 07-1492 (D.D.C. September 30, 2008).

The petition to correct the patent term adjustment indicated on the above-identified patent to indicate that the term of the above-identified patent is extended or adjusted by one thousand two hundred fifty-four (1254) days is GRANTED to the extent indicated herein.

At the outset, patentees have miscalculated the total patent term examination. The period of examination delay, "A" delay, pursuant to 37 CFR 1.702(a)(1) is 941 days. As the period from the filing date of the request for continued examination (RCE) to the issue date of the patent is not included in the "B" delay period, the over three year period begins on July 3, 2006 and ends on October 29, 2008, the day before the RCE was filed, and the B delay considering the 273 days of overlap is 849 (not 850) days. See 35 U.S.C. 154(b)(1)(B)(i). Non-overlapping B delay is 576 days.

Additionally, see the decision dated September 18, 2009 which noted that a period of reduction should have been entered for the Information Disclosure Statements (IDS) filed December 10, 2008, December 22, 2008 and January 12, 2009. The period of reduction pursuant to 37 CFR 1.704(c)(8) for filing the IDSs without a 1.704(d) statement after the request for continued examination is 74 days, counting the number of days in the period beginning on the day after the initial reply (the RCE) was filed, October 31, 2008 and ending on the date of filing of the last supplemental paper, the

IDS filed January 12, 2009. Accordingly, the patent term adjustment is 1254 (941 days "A delay" plus 849 days "B delay" minus 273 days overlap minus 263 days applicant delay), not 1309 days.

The Office will *sua sponte* issue a certificate of correction. Pursuant to 37 CFR 1.322, the Office will not issue a certificate of correction without first providing assignee or patentee an opportunity to be heard. Accordingly, patentees are given **one (1) month or thirty (30) days**, whichever is longer, from the mail date of this decision to respond. No extensions of time will be granted under § 1.136.

The application is being forwarded to the Certificates of Branch for issuance of a certificate of correction. The Office will issue a certificate of correction indicating that the term of the above-identified patent is extended or adjusted by **one thousand two hundred fifty-four (1254) days**.

Telephone inquiries specific to this decision should be directed to Senior Petitions Attorney Patricia Faison-Ball at (571) 272-3212.

/Kery A. Fries/

Kery A. Fries
Senior Legal Advisor
Office of Patent Legal Administration
Office of Deputy Commissioner
for Examination Policy

Enclosure: Copy of DRAFT Certificate of Correction

DRAFT

UNITED STATES PATENT AND TRADEMARK OFFICE
CERTIFICATE OF CORRECTION

PATENT : 7,605,138 B2

DATED : October 20, 2009

INVENTOR(S) : Arthur M. Krieg

It is certified that error appears in the above-identified patent and that said Letters Patent is hereby corrected as shown below:

On the cover page,

[*] Notice: Subject to any disclaimer, the term of this patent is extended or adjusted under 35 USC 154(b) by (732) days

Delete the phrase "by 732 days" and insert – by 1254 days--